

Remarks of FTC Chairman Jon Leibowitz  
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Thank you, Sean, for that kind introduction. While it is always difficult to have to follow my good friend Joaquin Almunia – *mi favorito líder socialista* – I hope to add something to this morning’s program by discussing the causes and consequences of continuity in competition enforcement at the Federal Trade Commission. My remarks will be brief so we have time for Q&A, knowing full well that the highlight of this portion of the agenda was lunch.

We meet today at the apogee of the election year storm, and it’s a doozy. Republicans, Democrats, Independents, and undecideds are unified in at least (and perhaps at most) one thing – their disdain for the vitriol that spews from attack ads, super PACs, talk radio, and cable news. Congress is wrapping up the most partisan, least productive session in my memory – and I remember when they still had spittoons on the Senate floor, or at least before C-SPAN. In this atmosphere, it is a challenge to talk about the achievements of a steady, bipartisan agency like the FTC.

So let’s talk instead about space – in particular, Neil Armstrong’s space. In the month since he passed away, so many have written so eloquently about his courage and modesty, but long-time NASA Administrator Daniel Goldin perhaps put it most simply and best when he stated: “He was the symbol of all that was good about America on July 20, 1969, his courageous feat representing one of the greatest triumphs ever achieved.”

At another divided time in our history, Armstrong’s one small step reminded America of the greatness of which our people and our government are capable. And yet, he refused to capitalize on his fame or accept laurels for his achievement. His obituary in the *Washington Post*

noted: “Mr. Armstrong felt awkward taking credit for the collective success of 400,000 employees of the space agency and its Apollo contractors.”

Armstrong would have told you, had he been willing to speak publicly about his Apollo days, that the success of his mission was the direct result of NASA’s ethos. Here was an agency that believed government could do big, even historic things; that maintained a consistency of vision, no matter which party was in charge; that moved forward with unwavering commitment to consensus and to results; and that was staffed from top to bottom with the most dedicated, disciplined, and qualified professionals.

To me, that sounds familiar. And though we have yet to shoot an antitrust lawyer into orbit – though, believe me, Tim Muris almost did on one or two occasions – the FTC has a record that, like the Apollo missions or the recent landing of Curiosity on Mars, reflect America at its best and smartest. And we got to our results the same way NASA did: with consistent, bipartisan policy, developed methodically through consensus, neither buffeted nor diverted by prevailing political winds.

The FTC is an independent agency. We are not part of the Administration; we do not work for Congress; and we do not worry about poll results. We operate in a bipartisan manner to promote competition and protect consumers. We have to: no more than three commissioners from the same party can serve at the FTC at the same time. Every Chairman has to get a majority, which in practice means that the Commission generally moves forward in a bipartisan fashion. The Chairman simply cannot walk in on his or her first day, and announce, as in Orwell’s *1984*, that “we have always been at war with Eastasia,” and expect the rest of the Commission and staff to start marching.

That, combined with a professional staff widely recognized as one of the most extraordinary in the federal government, has resulted in a competition agenda grounded in a steady and predictable set of priorities, as well as one of the federal agencies consistently ranked as among the best places to work in Washington. As we spend time refining our policies from administration to administration, we get better at deciding what is important, where we need to do more, and when competition is already working well so that there is no need for intervention.

That not only makes for good government; it is also good for business. Because we have been consistent over administrations, companies know that the rules of the road are the same regardless of who is in the White House: they know where we are going to go because they know where we have been.

That background makes it easier to understand what has been for the FTC a year of steady progress on our long-term priorities, including ensuring competition in healthcare and high technology markets.

## **I. Healthcare**

Healthcare costs represent about 18 percent of U.S. GDP today, a figure both unacceptable and unsustainable. Although, thankfully, the debate on the overall structure of the healthcare market rages at a level above the Commission's pay grade, we have for decades worked to ensure competition – and thus secure lower costs for consumers – in what market we have. Exhibit A is our unwavering pursuit of anticompetitive pay-for-delay deals between branded pharmaceutical companies and their generic competitors. Our work in this area spans 12 years, beginning under Chairman Pitofsky in the Clinton Administration, receiving the support of all three Republican Chairmen throughout the second Bush Administration, and continuing as a focus today.

That sustained effort recently paid off with the Third Circuit's *K-Dur* decision: there, the court adopted our position that, when compensation flows from the brand to the generic and the generic delays entry, the burden shifts to the parties to show that the compensation was not paid to affect that delay. The court not only adopted our proposed liability rule, it also cited three separate FTC reports on pharmaceutical competition, demonstrating the value of the FTC's wide array of investigative tools. Now that there is a clear circuit split on the legality of pay-for-delay deals between the Third (and possibly the Sixth and the D.C. Circuits), on the one hand, and the Second, Eleventh, and Federal Circuits on the other, we anticipate appealing our *Androgel* case to the Supreme Court and are hoping for a successful outcome if certiorari is granted. If not, of course, we'll simply be forced to bring pay-for-delay cases in the Third Circuit for years to come. After checking, it turns out that 95 percent of the pay-for-delay settlements filed with the FTC over the last eight years involved pharmaceutical companies that are headquartered or incorporated in the Third Circuit.

Regardless of how this issue develops over the coming months, the Third Circuit's decision in *K-Dur* is a win for American consumers and for the FTC; it shows us at our bipartisan, pragmatic best. Eliminating pay-for-delay deals would save American consumers \$3.5 billion annually and, because the federal government accounts for roughly one-third of the nation's prescription drug spending, it would lower the federal budget deficit by \$5 billion over ten years. We would also set an example for our European counterparts, who have, with two recent Statements of Objection by the European Commission in pay-for-delay cases, started to grapple with the issue as well.

The state action doctrine is yet another example of the Commission's long-term priorities bearing fruit. Later this year the Supreme Court will hear the *Phoebe Putney* case, the

Commission's challenge to a merger to monopoly of the only two hospitals in Albany, Georgia, which is a continuation – or could it be the culmination – of our state action initiative, which was started under the leadership of Tim Muris. Phoebe Putney is located in one of the poorest counties in the United States, with a 2009 median per capita income of \$15,761. Under a Georgia healthcare statute adopted in 1941, local governments are authorized to establish authorities with the power to own and operate hospitals or to lease them to private entities. One such authority has owned Phoebe Putney since 1941. In 1990, the authority rented Phoebe Putney to a private non-profit, ceding full control (though nominally continuing to own the hospital).

The private group operated Phoebe Putney for 20 years without any supervision at all by the hospital authority or any other state entity. Then, in 2010, Phoebe Putney sought to buy its only competition in the five-county Albany metropolitan area, Palmyra Park Hospital. Tellingly, the authority initially was not even aware of Phoebe's negotiations with HCA, Palmyra's owner, until after the parties inked the acquisition deal. In the preliminary injunction proceeding, Phoebe and the hospital authority did not dispute the Commission's competitive effects allegations. Instead, Phoebe asserted that it was immune from antitrust oversight under the state action doctrine.

Many of you know that the Eleventh Circuit has long held an "anything is foreseeable" view of the state action doctrine, one that we believe is out of line with the other circuits. So we were not surprised when we lost on state action in district court and again on appeal. But even the Eleventh Circuit acknowledged that on the facts alleged, the merger would substantially lessen competition or tend to create a monopoly.

We are delighted that the Supreme Court granted certiorari to provide clarity to the boundaries of the state action doctrine. We believe that the Eleventh Circuit’s radical view subverts both the clear articulation and active supervision prongs of the state action doctrine. And we are hopeful for a good outcome for consumers and small businesses in Albany, Georgia. As with so many of our competition cases, this one is really about increasing choices for real people with real problems.

Our consistent approach to competition helps in cases like these, where we are fighting all the way to the Supreme Court, but also when we decide *not* to take action. Recently, my friend and former colleague Bill Kovacic said that antitrust authorities get “extra credit for [bringing] big cases.” While Bill does have a point, the truth is that when the facts lead us to the conclusion that a law enforcement action is not warranted, even in a high profile matter, we will close our investigation. For example, this year, we closely reviewed, and ultimately cleared, the merger of Express Scripts and Medco. This merger of the number two and three pharmacy benefit managers was over the HHI threshold of 2500 and therefore presumptively anticompetitive. We received more than 80 calls and letters from Members of Congress, urging us to block the transaction (although there was one letter in favor).

In the end, we followed the facts where they led and let the deal go through. Shockingly, our decision prompted positive editorials in both *The Wall Street Journal*, which praised our “nuanced investigation ... as a win for competition and consumer choice” and *The New York Times*, which wrote that the our action “deserved credence because of the thoroughness of the FTC’s eight-month investigation and the willingness of the agency to challenge other mergers when the evidence warrants.” That newspapers at divergent ends of the ideological spectrum

simultaneously endorsed our work was a gratifying validation of decision-making based on law and not politics.

## **II. Technology**

The Commission's continuing work at the intersection of competition and intellectual property law is another example of how having consistent priorities over time pays off.

Recently, we have delved deeply into the ongoing debate over the assertion of standards essential patents (or "SEPs") that come with a RAND commitment. Like many in the antitrust community, we are concerned that a patent holder may use the threat of an ITC exclusion order, or an injunction issued in district court, to unfairly hold up or demand higher royalties – or other more costly licensing terms – for these patents after the standard is implemented than could have been obtained before its IP was included in the standard. Seeking an injunction or an exclusion order for a standard essential patent is in tension with the RAND commitment, especially when there is a licensee willing to negotiate a license on RAND terms. The risk of patent hold-up may also be a factor in the recent expensive – and probably wasteful – acquisitions of patent portfolios by many large technology companies for defensive purposes.

Like our commitment to stopping pay-for-delay deals, our concern with the anticompetitive effects of the gaming of patent rights and patent hold-ups extends over many years, beginning 16 years ago in *Dell Computer* during the Clinton Administration and continuing through *Rambus* and the comparatively recent *N-Data* consent, both brought during Republican administrations. Along the way, the FTC has developed substantial policy expertise in this field, putting out a report in 2003 – which was cited by Justice Kennedy's *eBay* concurrence – as well as other reports in 2007 and 2011. As we have learned, hold-up and the threat of hold-up can deter innovation by increasing costs and uncertainty for a variety of

industry participants, including other patent holders. The threat of hold-up also may reduce the value of standard setting. This is an even bigger problem when the hold-up creates a very high cost for a very small component of the overall product. When the allegedly infringing component is, say, only one of 15,000 patents used in a smart phone or a tablet, is it fair to demand two percent of the entire sales price?

To ask that question is to answer it.

Now, the Supreme Court's decision in *eBay* sets forth a nuanced and flexible analysis that recognizes the ability of injunctions in some situations to unnecessarily raise costs and deter innovation. Although all federal district courts must follow the injunction analysis in *eBay*, the International Trade Commission, another venue in which patentees may litigate, does not. Because the ITC does not apply *eBay*, a finding of infringement in the ITC still leads to a nearly automatic exclusion order. Use of the ITC as a venue for patent challenges has tripled in the last ten years, threatening to undermine the procompetitive aspects of the *eBay* decision and turn the ITC – with its antique and binary remedial scheme – into a forum for patent hold-up, patent gaming, and patent mischief.

For all these reasons, we filed with the ITC in the recent Motorola Mobility/Google cases against Apple and Microsoft, arguing that the “public interest” prong of Section 337 of the ITC's statute should, in essence, trump any findings of infringement. Although the ITC decided largely against Google on more technical grounds, we are confident that our filing influenced the ITC's thinking on this issue in a direction that was pro-consumer and pro-innovation.

There's another, unexpected “side benefit” to our ITC filing: rapprochement between our agency and Judge Richard Posner. Shortly after we filed with the ITC, Judge Posner favorably cited our filing in denying injunctive relief in the Apple v. Motorola litigation. For those few of

you around long enough to recall, in the early 1960s Judge Posner clerked for FTC Commissioner Phil Elman. In the late 1960s, as a member of the Kirkpatrick Commission, he called for shutting down the FTC. As he then wrote, “The commission has done so badly continuously over so long a period of time that it is difficult any longer to regard its failings as accidental and remediable ... It is scandalous to allow so dubious an enterprise to continue to wax in size and power.”

So we are just pleased that he likes us again!

More seriously, we are pleased that a consensus seems to be developing, disfavoring injunctive relief where parties have made RAND commitments. If the patent licensee is willing to accept a license on RAND terms, it is unclear why a licensor should ever be able to demand an injunction or exclusion order. Because of its potential to undermine standard setting and lead to higher prices for consumers, such a demand may be an unfair method of competition under Section 5 of the FTC Act which, as all of us in this room understand, Congress intended to extend well beyond the reach of the antitrust laws.

Finally, as some of you may have heard, the Commission is conducting a nonpublic investigation into Google’s practices in the search and search advertising markets. We are currently weighing the evidence and, while it is uncertain whether we will find reason to believe that Google has violated Section 5, it is certain that the decision will be made in the same bipartisan, collegial and consensus-driven spirit with which we approach all of the complex cases we handle. We will resolve this matter expeditiously because, while no one deserves any particular outcome, everyone deserves a timely decision. And if we do elect to issue a complaint, our rules of administrative litigation will ensure Google a trial within eight months, much faster than in the federal district courts.

Or perhaps even the European Union.

As Neil Armstrong once said: “I guess we all like to be recognized, not for one piece of fireworks, but for the ledger of our daily work.” Looking back at the Commission’s ledger, for this year and for many years before that, we can conclude with confidence that we have consistently and productively balanced our books to the benefit of consumers and markets alike – perhaps not a giant step for mankind, but a solid demonstration of the good that government can do when decent and smart people from both parties commit to common and practical goals.

And with that, I will open the floor to questions.